

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DATEEN D. ARKELL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11499  
Trial Court No. 4GA-12-014 CR

MEMORANDUM OPINION

No. 6312 — April 20, 2016

Appeal from the Superior Court, Fourth Judicial District,  
Fairbanks, Michael P. McConahy, Judge.

Appearances: Kevin Higgins, Anchorage, under contract with  
the Public Defender Agency, and Quinlan Steiner, Public  
Defender, Anchorage, for the Appellant. Donald Soderstrom,  
Assistant Attorney General, Office of Criminal Appeals,  
Anchorage, and Craig W. Richards, Attorney General, Juneau,  
for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,  
Superior Court Judge.\*

Judge MANNHEIMER.

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\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Dateen D. Arkell appeals his conviction for third-degree assault for beating up his girlfriend. Arkell contends that the grand jury proceedings were tainted by the introduction of inadmissible hearsay evidence, and he also contends that the trial judge should have declared a mistrial after one of the State's witnesses (the victim's mother) answered one of the prosecutor's questions in a manner suggesting that Arkell had previously assaulted her daughter. For the reasons explained in this opinion, we affirm Arkell's conviction.

*Arkell's claim regarding hearsay testimony at the grand jury*

On March 22, 2012, Arkell and his long-time girlfriend Charlene Honea spent the night partying. Sometime later that evening, Honea arrived alone at the residence of Arnold Captain. According to Captain's grand jury testimony, Honea was visibly injured, and she was "upset and scared" when she came to his house. Honea told Captain that Arkell had beaten her.

Shortly after Honea arrived at Captain's house, she telephoned her mother, Joyce Honea. Honea told her mother that Arkell had beaten her. According to Joyce Honea's testimony at the grand jury, her daughter was crying and sounded "very upset".

Based on this testimony and the testimony of other witnesses, the grand jury indicted Arkell for third-degree assault, based on the theory that Arkell committed acts that would constitute fourth-degree assault, and that he had two prior assault convictions within the preceding ten years. AS 11.41.220(a)(5)(B).

Arkell asked the superior court to dismiss this indictment, arguing that Arnold Captain and Joyce Honea had given inadmissible hearsay testimony when they testified that Charlene Honea said that Arkell was the one who beat her up. The superior

court ruled that this testimony, although hearsay, fell within the “excited utterance” exception to the hearsay rule.

Under the excited utterance exception to the hearsay rule, Alaska Evidence Rule 803(2), evidence of a hearsay statement is admissible if the proponent of the evidence establishes (1) that the out-of-court statement related to a “startling event or condition”, and (2) that the person made the out-of-court statement “under the stress of excitement caused by [that startling] event or condition.”

In *Sipary v. State*, 91 P.3d 296, 305-06 (Alaska App. 2004), this Court held that this second portion of the evidentiary foundation — whether a person was “under the stress of excitement” caused by a startling event or condition — is a question of *fact*, because it ultimately hinges on the person’s mental state at the time. Therefore, when we review a trial judge’s ruling on this question, we use the “clearly erroneous” standard of review — *i.e.*, the standard of review that applies to findings of historical fact.

As we have explained, Arnold Captain testified that Charlene Honea was frightened and injured when she declared that Arkell beat her up, and Joyce Honea testified that her daughter was crying and upset when she repeated this accusation a few minutes later. Given this testimony, we conclude that the superior court was not clearly erroneous when the court ruled that Charlene Honea’s statements to Captain and to her mother constituted excited utterances under Evidence Rule 803(2).

Arkell argues that other inadmissible hearsay was introduced at the grand jury. But given our ruling that Honea’s initial statements to Arnold Captain and to her mother were admissible, we conclude that even if the grand jurors should not have heard the other hearsay testimony that Arkell challenges, the error was harmless.<sup>1</sup>

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<sup>1</sup> See *Stern v. State*, 827 P.2d 442, 445-46 (Alaska App. 1992).

*Arkell's argument that the trial judge should have declared a mistrial after Joyce Honea suggested that Arkell had beaten her daughter before*

The victim's mother, Joyce Honea, testified at Arkell's trial. When the prosecutor asked Joyce why she called the village public safety officer after speaking with her daughter, Joyce replied, "[Charlene] said, 'Dateen beat me up again.' And I told her, 'I'm not letting this go again.'"

Based on Joyce's reference to prior beatings, Arkell's attorney asked for a mistrial. The trial judge concluded that a mistrial was not required — that the problem could be cured with a jury instruction. The judge immediately instructed the jurors that they were to disregard Joyce Honea's references to any prior misconduct.

The question of whether an occurrence like this requires a mistrial, or whether it can be cured by lesser means, is entrusted to the trial judge. An appellate court will reverse a trial judge's ruling only if it constitutes an abuse of discretion — *i.e.*, only if the judge's decision is clearly unreasonable or untenable.<sup>2</sup>

Here, Joyce Honea's reference to prior instances of assault was brief and it contained no details. The trial judge immediately instructed the jurors to disregard Joyce's assertion that this had happened before.

Moreover, the jury was going to hear (and did hear) much more explicit evidence that Arkell had committed assaults in the past. As we explained earlier in this opinion, Arkell was charged with third-degree assault under the theory that his actions in the present case constituted fourth-degree assault, and that his crime was aggravated to third-degree assault because he had two prior convictions for assault in the preceding

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<sup>2</sup> See *Phillips v. State*, 70 P.3d 1128, 1138 (Alaska App. 2003); *Noah v. State*, 887 P.2d 981, 983 (Alaska App. 1995).

ten years. Arkell did not ask for bifurcation of his trial, so the jurors heard direct evidence of these two prior assault convictions (without objection).

Given these circumstances, the trial judge did not abuse his discretion when he declined to order a mistrial and instead instructed the jurors to disregard Joyce Honea's reference to potential prior misconduct.

### *Conclusion*

The judgement of the superior court is AFFIRMED.